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No. 88-803

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

GRANT ANTHONY,

Petitioner,

v.

OTIS R. BOWEN, Secretary,
United States Department
of Health and Human Services, et al.

Respondents.

MEMORANDUM IN REPLY
and APPENDIX

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MEMORANDUM IN REPLY

I. Introduction.

What was at stake in the substantive proceedings below was, simply, the integrity of the administrative process under Title VII. The respondent would have this court believe that the statutory scheme provides adequate remedies beyond the administrative scheme and therefore the petitioner

would have suffered "no prejudice" had the district court refused to issue the writ of mandamus. Memorandum of Respondent in Opposition ("Opp."), p. 7. This is not the case. As the district court rightfully pointed out in its unpublished jurisdictional order of June 25, 1985 (annexed hereto at Reply App., p. 1a, et seq.):

> More fundamentally, one purpose of Title VII's provision for an administrative remedial scheme is to facilitate conciliation. A precondition to meaningful conciliation is the agency's recognition of the full scope of the alleged discrimination. If the agency's view of the complaint -- and corresponding limits on the investigation -- are unduly narrow, plaintiff's remedy under Title VII is not adequate and mandamus may be appropriate.

Reply App., pp. 14a-15a. By arbitrarily narrowing the scope of the investigation, the respondent here did attempt to prejudice the petitioner, and attempt to deny to him complete access to the

administrative process, including conciliation. In so doing, the respondent wrongfully attempted to shift the costs of going forward from the agency on to this GS-5 government employee. Further, the bad faith of the agency in this matter continues.

II. Supplemental Statement of the Case.

Upon petitioner's November 1, 1988 motion to the district court to reopen the proceedings there and to hold the respondent in contempt for violation of the order of that court of June 12, 1987, and of the order of the United States Court of Appeals for the District of Columbia Circuit of March 5, 1987, Appendix to Opposition ("Opp. App."), p. 1a, et seq., on December 27, 1988, the district court issued its opinion and order. This document appears in full at Reply App., p. 20a, et seq., below. In that December 27, 1988 ruling, the

district court held that the respondent had violated its June 12 order; the respondent had not conducted the required investigation. Reply App., p. 29a. The district court, however, refused to hold the respondent in contempt, giving the agency still yet another 180 days within which to comply with said orders to investigate the claims of the petitioner. The district court did reopen the case, did retain supervisory jurisdiction over the investigation of the claims of the petitioner, and did indicate that if by June 25, 1989 the investigation was not completed, it would then consider the motion for contempt. The facts giving rise to the initial cause continue to obtain five years later despite the two favorable orders of court which give rise to the attorneys fees issue here. The attorneys fee provisions of Title VII were designed to aid low income persons in

the redress of their rights. The decision of the circuit court in this matter vitiates that statutory intent.

III. Errors in Respondent's Memorandum.

A. Factual.

The respondent errs in stating that the district court did not address the jurisdictional issue. Opp., p. 3. The court did so, fully and coherently in its June 25, 1985 order. Reply App., p. 1a, et seq., below; and see Opp. App., p. 4a.

Second, not only did the petitioner appeal from the district court order of April 25, 1986, 674 F. Supp. 876 (D.D.C. 1986), so too, did the respondent. Opp., p. 3; and note "absence of cross appeal by the government" language at Opp., p. 6; and see Reply App., p. 24a. Technically, petitioner filed a cross-appeal, as respondent appealed first from the April 25, 1986 order. The respondent, upon instruction from the

Department of Justice, then voluntarily withdrew (dismissed) its appeal. The circuit court in turn directed petitioner to assume the role of appellant. The result was the March 5, 1987 circuit court order.

B. Legal.

Legally the assumption of mandamus jurisdiction was proper. The court of appeals did not question the propriety of mandamus jurisdiction. What it questioned was the issuance of the writ, i.e., "whether the mandamus statute... is properly deployed for ... monitoring" the processing of Title VII claims at the administrative stage. Opp. App., p. 4a. The court of appeals, however, did utilize the writ to order the investigation of all eighteen Stride positions. Ibid.

IV. Argument In Reply.

1. The respondent attempts to shift

the focus of the issue before this court for which certiorari is requested from that of whether attorney's fees are to be awarded under Title VII or under EAJA to the appropriateness of the use of mandamus by the district court and the Court of Appeals for the District of Columbia Circuit. The respondent appealed from the district court order by which relief in the nature of mandamus was granted, and then he dismissed his appeal. Although respondent asked the circuit court for reconsideration of its March 5, 1987 order, which was denied, it did not bring the use of mandamus by either court to this court's attention. The issue of the appropriateness of mandamus is, thus, without viability and is not before this court. Parenthetically, it is not at all certain that a writ of mandamus was ever issued; with proper 28 U.S.C., section 1361 juris-

diction, declaratory relief could have been granted under 28 U.S.C., sections 2201-2202. See Reply App., p. 5a n. 1.

2. There is no doubt as a matter of fact that the special leave issue is over, a final determination has been made by the district court. The question is whether as a matter of law, the district court's foreclosure of the reopening of that issue constitutes a proper predicate for a Title VII attorneys' fee award. The respondent ducks this issue. The respondent pegs its posture to the statements of the court of appeals that the court did not know of the outcome of the remaining claims of illegal discrimination. Opp., p. 5 n. 3. Yet it is abundantly clear that the special leave procedure issue was then out of the hands of the agency, excepting for the attorneys' fee award associated therewith. 674 F. Supp. at 880. Thus, the

court of appeals references to its not knowing the posture of the investigations could not refer to the special leave restriction issue upon which petitioner prevailed. Rather they encompass only the fourteen remaining Stride slots and their investigations by the agency.

3. The respondent's assertion that this case does not warrant review by this court on the basis that it does not "present an issue of recurring, prospective significance" is disingenuous. Opp., p. 8. Even if there were such a requirement, it is clearly satisfied here. As the pleadings below demonstrate, what is at issue in this case are fundamental aspects of Title VII litigation, to wit: the concept and definition of "prevailing party" and its relation to the government's impermissive narrowing of Title VII. Likewise, the relation between The Mandamus Act, as an

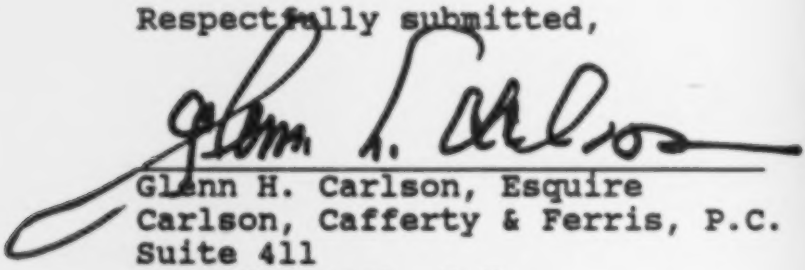
enabling statute, to Title VII is at issue. The attorney's fee provision of Title VII is, without question a significant component of the overall statutory scheme. The effectiveness of that statute, particularly in relation to low income litigants, is directly dependent upon the applicability of the attorneys' fees provision. This case is no less significant than those Title VII attorneys fees cases previously addressed by this court, e.g., Hanrahan v. Hampton, 446 U.S. 754, reh'g denied, 448 U.S. 913 (1980), upon which in this case the circuit court hung its hat.

V. Conclusion.

This case does, therefore, present an important, unsettled question of federal law, in fact a case of first impression, worthy of consideration by this court. Petitioner renews his prayer that his petition for the issuance of a

writ of certiorari issue from this court to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



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APPENDIX F

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF COLUMBIA

Civil Action No. 84-0385

GRANT ANTHONY,

Plaintiff,

v.

MARGARET M. HECKLER,

Defendant.

ORDER

Plaintiff Grant Anthony brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000e et seq., as amended ("Title VII"), and the Mandamus Act, 28 U.S.C., section 1361, to challenge the scope of the ongoing administrative processing of his complaint of employment discrimination. Currently before the Court is the motion of defendant Margaret M. Heckler, Secretary, United States Department of

Health and Human Services ("HHS"), to dismiss the complaint or, in the alternative, for summary judgment.

Before responding to defendant's motion, plaintiff requested leave to take discovery and to obtain and file the administrative record of the underlying discrimination complaint. Plaintiff's requests were denied by Order dated December 20, 1984, on the basis that the "purely legal issues" raised by defendant's motion to dismiss did not call for discovery or the filing of the record of the administrative processing. That Order further provided that "should defendant's motion [to dismiss the complaint] be denied, and should the Court decide to consider defendant's alternative motion for summary judgment, plaintiff's motion to permit discovery, if renewed, shall be considered . . . ." Dec. 20, 1984 Order at 2. Since that

Order issued, the parties have presented their positions on the motion to dismiss through a barrage of supplemental memoranda, all of which have been fully considered. For the reasons stated below, this action will in part survive defendant's motion to dismiss and shall proceed to summary judgment or trial.

At all relevant times, plaintiff, a black male, has been employed as a psychiatric patient care technician at the National Institutes of Health ("NIH"), a branch of HHS. On May 10, 1979 he filed with the agency a formal administrative complaint, alleging race-based and sex-based discrimination in his nonselection for various positions offered in NIH's 1978-79 Stride Program. His current complaint regarding the agency's processing of the 1979 administrative complaint is twofold. First, he challenges HHS' decision not to

investigate, on remand from the Equal Employment Opportunity Commission ("EEOC"), his unsuccessful application for fourteen of the eighteen Stride Program positions allegedly encompassed by the 1979 complaint. The agency did accept for investigation on remand plaintiff's discrimination claims as to the four positions for which plaintiff had been found highly qualified. Defendant now contends, against plaintiff's opposition, that the 1979 administrative complaint addressed only those four jobs.

Plaintiff also challenges defendant's decision to investigate on remand the issue of discriminatory application of leave procedures. According to plaintiff, the leave issue has already been the subject of a final agency decision. Plaintiff concedes that he has requested a hearing as to whether

that decision should have included an award of attorney's fees, but he maintains that the agency has no discretion to reopen investigation of the merits of the leave issue. Defendant denies entering a final agency decision on any aspect of the leave issue. The question now before this Court is whether, if plaintiff's factual allegations are correct, see Conley v. Gibson, 355 U.S. 41 (1957), he can state a claim actionable under Title VII and/or the mandamus statute.[1/] Because mandamus would be inappropriate if plaintiff's

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1/ Both parties recognize that if jurisdiction is proper under either or both of those statutes, plaintiff's request for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. sections 2201-2202, will withstand defendant's motion to dismiss.

claim is redressable under Title VII, see generally Ganem v. Heckler, 746 F.2d 844, 849 (D.C. Cir. 1984), citing Heckler v. Ringer, ___ U.S. ___, 104 S. Ct. 2013 (1984), the Title VII issue must be addressed first.

The EEOC regulations promulgated under Title VII provide pertinent part that:

> An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States district court.
>
> (a) Within thirty (30) calendar days of receipt of notice of final action taken by the agency on a complaint.
>
> (b) After one hundred and eighty (180) calendar days

> from the date of filing a complaint with the agency if there has been no decision.
>
> . . . .
>
> [The decision] of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs.

29 C.F.R., section 1613.281.[2/] Even if, as plaintiff contends, (1) defendant has entered a final agency decision on the leave issue and (2) the decision to investigate plaintiff's nonselection to only four positions constitutes a final rejection of palintiff's claims as to the remaining fourteen positions, "all of the

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2/ Part (b) of this regulation is not at issue.

issues" presented in plaintiff's administrative complaint have not been decided: there is no question that the agency investigation of plaintiff's nonselection to at least four positions addressed in that complaint is ongoing. Accordingly, Title VII does not afford a cause of action given the current posture of this case.[3/] Plaintiff's right to relief, if any, must be litigated under the madamus statute.

The Mandamus Act "provides an independent grant of [federal court] jurisdiction", Welch v. Donovan, 551 F.

3/ Before filing this complaint, plaintiff appealed to the EEOC the issue of the scope of the agency investigation on remand. The EEOC denied the appeal as premature, but advised plaintiff that he had a right to file a federal court action to pursue the matter further. Complaint, Exh. 1. Due to the posture of plaintiff's discrimination complaint at the agency level, the EEOC's notice of right to sue was clearly in error.

Supp. 809, 810 (D.D.C. 1982), "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C., section 1361.

> As an extraordinary remedy, mandamus generally will not issue unless there is a clear right in the plaintiff to the relief sought, a plainly defined and nondiscretionary duty on the part of the defendant to honor that right, and no other adequate remedy, either judicial or administrative, available.

Ganem v. Heckler, 746 F.2d at 852 and cases cited therein.

In its motion to dismiss, defendant argues that the scope of defendant's investigation of discrimination claims is a discretionary matter and that mandamus

relief would improperly interfere with the agency's administrative processing of plaintiff's complaint. In fact, the very EEOC regulation relied upon by defendant demonstrates that an agency's discretion to reject claims raised by a complainant is subject to limitations.

> The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of section 1613.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency.

29 C.F.R., section 1613.215. Under this

regulation, an agency is authorized to reject allegations only under certain circumstances. See Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980) (additional exceptions are not to be inferred in the absence of evidence of a contrary intent). Defendant does not contend that plaintiff's nonselection for the fourteen Stride Program positions in dispute is the subject of a previous pending complaint filed by plaintiff or that it is a matter outside the purview of section 1613.212 (regarding coverage of Title VII). However, defendant does argue that plaintiff is now--untimely--seeking to enlarge the scope of his 1979 agency complaint to encompass the fourteen positions not under investigation. If, as plaintiff alleges, the 1979 complaint placed at issue his nonselection for eighteen separate jobs,

defendant has neither authority nor discretion under 29 C.F.R., section 1613.215 to decline to investigate plaintiff's claims as to all but four positions. Moreover, case law cited by defendant in no way established that the mandamus remedy is unavailable to compel agency investigation of claims timely raised and not subject to rejection. Cf. Feldstein v. EEOC, 547 F. Supp. 97, 101 (D. Mass. 1982) (mandamus action against EEOC unavailable where plaintiff can fully vindicate his rights against the employing agency directly); Trout v. Lehman, Civil Action No. 82-2507, slip op. at 3 (D.D.C. July 7, 1983) (holding that de novo Title VII action on merits is plaintiff's sole remedy for claim of unsatisfactory administrative investigation of claims accepted by agency; plaintiff did not raise issue of improper rejection of claims).

Accordingly, if plaintiff's factual allegations are true, plaintiff has a right to compel investigation of his discrimination claims with respect to the remaining fourteen jobs, and defendant has a nondiscretionary duty to do so under 29 C.F.R., section 1613.215[4/]

Defendant contends that even if HHS has improperly restricted the scope of its investigation, plaintiff has an

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4/ Under United States v. Caceres, 440 U.S. 741, 749 (1979), agency regulations promulgated under Title VII have the force of law and may be enforced by a federal court. It has been suggested that even though a violation of a substantive agency regulation (affirmative action guidelines) promulgated under Title VII need not be redressed as if it constituted a direct violation of Title VII's substantive provisions, another type of action to enforce the regulation may be appropriate. Page v. Bolger, 645 F.2d 227, 232 n.10 (4th Cir.), cert. denied, 454 U.S. 892 (1981) (cited by defendant and in Trout v. Lehman, supra).

adequate alternative remedy in that he can raise that issue before the EEOC and, if necessary, this Court, following entry of a final decision on all aspects of his complaint recognized by HHS. This contention is at odds with defendant's professed concern for avoiding piecemeal resolution of plaintiff's claims. See Defendant's Memorandum at 4. If plaintiff's 1979 complaint does in fact encompass discrimination claims as to eighteen Stride Program positions, it would be grossly inefficient to proceed with investigation of only a fraction of those claims instead of investigating all simultaneously.[5/] More fundamentally, one purpose of Title VII's provision for an administrative remedial scheme is to

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5/ When a plaintiff challenges the depth but not the scope of an agency investigation, this issue does not arise. Cf. Trout v. Lehman, supra.

facilitate conciliation. A precondition to meaningful conciliation is the agency's recognition of the full scope of the alleged discrimination. If the agency's view of the complaint--and corresponding limits on the investigation--are unduly narrow, plaintiff's remedy under Title VII is not adequate and mandamus may be appropriate.

In requesting mandamus relief to prohibit defendant from investigating on remand the entirety of the leave issue (as opposed to the limited matter of attorney's fees), plaintiff contends that the merits of the leave issue are already the subject of a final agency decision in plaintiff's favor which defendant is without discretion to disturb. The basis of this contention is the undisputed fact that the agency, by failing to act on plaintiff's complaint within thirty days after receipt of the

file and recommended disposition from the EEOC, was compelled to adopt verbatim the EEOC's recommendation, which included findings for plaintiff on the merits of the leave issue. See Complaint, Exh. 3; Memorandum of Understanding [between EEOC and defendant] filed December 27, 1984. Plaintiff overlooks the fact that the EEOC/HHS Memorandum of Understanding provides that in these circumstances, "the Agency will adopt EEOC"s recommended disposition as its proposed disposition of the complaint." Ordinarily, this provision would not impose a duty on defendant's part to stand by its proposal, and plaintiff could claim no right to have that proposal made final. However, plaintiff further alleges that defendant has "executed the remedial action" set forth in the proposed disposition. Complaint, para. 12. If this is so, plaintiff may be able to

construct an estoppel argument that would support issuance of a writ of mandamus prohibiting defendant from investigating on remand the entirety of the leave procedures issue. Accordingly, without commenting on the merits of such a claim, defendant's motion to dismiss this aspect of plaintiff's mandamus action will be denied.

To summarize, plaintiff's challenge to defendant's administrative processing of his employment discrimination complaint cannot be maintained under Title VII, and defendant's motion to dismiss is hereby granted to that extent. However, defendant's motion to dismiss plaintiff's mandamus action and request fro relief under the Declaratory Judgment Act (see n. 1, supra) is hereby denied. Whether a writ of mandamus will issue to prohibit defendant from investigating on remand the leave procedures issue (except

as it relates to attorney' fees) will depend on plaintiff's ability to develop a successful estoppel argument. Whether defendant may be compelled under a writ of mandamus to investigate plaintiff's discrimination claims as to each of eighteen Stride Program positions will depend on whether plaintiff's May, 1979 complaint encompassed those positions, which is, at least in part, a question of fact. Further discussion of these questions must await completion of limited discovery, as provided below:

1. Defendant shall file with the Court, no later than July 10, 1985, the entire record of administrative proceedings on plaintiff's 1979 agency complaint.

2. Defendant's responses to plaintiff's outstanding requests for admissions (filed October 19, 1984) shall be filed no later than July 10, 1985.

3. If necessary, the parties may take limited discovery carefully tailored to the issues identified above at page [17a], the period for such discovery ending August 1, 1985.

4. Within twenty days following the close of discovery, defendant may supplement its alternative motion for summary judgment, if desired, and plaintiff may file his own cross-motion for summary judgment, if desired. The parties' oppositions to those motions shall be due within ten days thereafter; replies shall follow within seven days thereafter.

SO ORDERED, this 25th day of June, 1985.

/S/
JOYCE HENS GREEN
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA
Civil Action No. 84-0385

GRANT ANTHONY,
Plaintiff,
v.
MARGARET M. HECKLER,
Defendant.

OPINION AND ORDER

In yet another chapter in this long-running saga, plaintiff Grant Anthony has filed a motion asking this court to reopen this case, to find defendant Otis R. Bowen, Secretary of Health and Human Services (HHS), in contempt of orders of this court and of the United States Court of Appeals for

the District of Columbia, and to sanction defendant for his alleged contempt. For the reasons articulated below, plaintiff's motion will be granted in part and denied in part.

I. Background

This history of this litigation is critical to the resolution of the instant motion and is therefore recounted here in some detail. Plaintiff Grant Anthony is a black male who, at all relevant times, has been employed as a patient care technician at HHS' National Institutes of Health (NIH). In early 1979, plaintiff alleged to an equal employment officer that he was being discriminated against on the basis of his sex and race, making general allegations as to lack of training programs, failure to promote, improper performance evaluations and unfair use of special leave procedures. While informal conciliation and

investigation was underway, Anthony filed a formal complaint of discrimination May 10, 1979. His complaint again alleged that educational programs were being denied to black workers and added a new claim -- that, when blacks were found to be "highly qualified" for NIH's Stride program (a career development program at theagency), those positions were cancelled. The Equal Employment Opportunity Commission (EEOC) investigated the complaint and issued a Recommended Disposition in August 1981 finding (1) that there was probable cause to believe that special leave procedures had been imposed upon Anthony because of racial animus and (2) that probable cause did not exist to support the finding that plaintiff had been discriminated against with respect to five of the eighteen Stride positions for which he had applied and been found to be highly qualified.

After the EEOC's decision was adopted by NIH, plaintiff requested a hearing and, in part because both parties agreed that the initial investigation had been inadequate, the complaint was remanded to the agency. NIH accepted the complaint on March 9, 1983 and initiated a supplemental investigation which (1) focused on only four of the eighteen Stride positions and (2) reopened the special leave issue.

With the supplemental investigation still pending, plaintiff filed this suit on Februry 6, 1984. Predicating jurisdiction under the general mandamus statute, see 28 U.S.C., section 1361, Anthony contended that NIH had improperly limited the scope of its supplemental investigation only to the Stride positions for which he was qualified (rather than all eighteen positions to

which he applied) and had illegally reopened the special leave issue. Ruling on the parties' cross-motions for summary judgment, this Court held in an Order issued on April 25, 1986 that, because Anthony had only raised the "highly qualified" issue -- but not his non-selection for all eighteen positions -- in his formal complaint, he could not rely on pre-complaint materials to broaden the investigation and that EEOC was not bound to investigate all eighteen positions for which plaintiff had applied. See Anthony v. Bowen, 674 F. Supp. 876, 878-80 (D.D.C. 1986). At the same time, however, defendant's arguments that it was entitled to reopen its investigation with respect to its use of special leave were rejected; summary judgment was entered in favor of plaintiff on that matter. Id. at 880.

Both parties appealed. In an

unpublished Memorandum Opinion issued on March 5, 1987, the Court of Appeals ruled that post-complaint evidence should have made clear that Anthony intended to challenge his nonselection for all eighteen Stride slots. It therefore remanded that portion of this case to this Court "with instructions to return it to the agency so that Anthony may promptly receive a complete administrative ruling on the full (eighteen opportunity) discrimination claims he attempted to present."[1/] After receiving the Court of Appeals' mandate on June 10, 1987, this Court issued an Order on June 12, 1987 dismissing this case and remanding it to defendant "for the purpose of providing the plaintif... a prompt and complete administrative

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1/ The Court of Appeals affirmed this Court's ruling on the special leave issue.

ruling on the eighteen opportunity discrimination claims he attempted to present before the agency."[2/]

During the time of this litigation in federal court, the supplemental administrative investigation continued within NIH. On November 13, 1986, a Proposed Disposition was issued finding that plaintiff had not been discriminated against with regard to the four Stride positions for which he was found highly

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2/ In a separate matter not at issue here, defendant also appealed from an Opinion and Order issued on July 29, 1988, granting plaintiff approximately $40,000 in attorney's fees under a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000(e)-5(k). On June 7, 1988, the Court of Appeals vacated that award and remanded to this Court for a determination of Anthony's entitlement to fees under the Equal Access to Justice Act, 28 U.S.C., section 2412. See Anthony v. Bowen, 848 F.2d 1278 (D.C. Cir. 1988). Anthony has recently filed a petition for a writ of certiorari challenging the Court of Appeals' ruling on the attorney's fee question. See Exhibit to Plaintiff's Reply Brief.

qualified. Anthony promptly requested a hearing on that decision and, in light of the intervening ruling of the Court of Appeals (and this Court on remand), the EEOC hearing examiner remanded Anthony's complaint to NIH for further proceedings. On November 3, 1987, the agency accepted the allegations of plaintiff's complaint concerning the remaining fourteen Stride positions.

Matters stood this way until November 1, 1988, when Anthony filed the instant motion. As the basis for reopening this action and holding defendant in contempt, plaintiff pointed out that he had still not received a ruling from NIH on its third investigation of this complaint. Analogizing defendant's actions to a situation where a party had disregarded discovery orders, Anthony urged this Court to invoke Fed. R. Civ. P. 37(b) and sanction defendant

by deeming as established "for all purposes of this suit and any ancillary or parallel administrative proceedings" the fact that plaintiff had been discriminated against on the basis of race and sex when he was not selected for the fourteen Stride positions for which he applied but was not highly qualified.

Defendant opposed Anthony's motion on November 21, 1988. In its opposition, defendant argued that plaintiff's motion was moot because, on November 17, 1988 -- just four days earlier -- NIH had issued a Proposed Disposition rejecting Anthony's claims of discrimination with respect to all eighteen Stride positions. Defendant also argued that the delay in the issuance of its decision could not be compared with a failure to adhere to discovery orders under Rule 37 and that, if a finding of contempt was entered, the

Court should not reach the merits of Anthony's underlying Title VII complaint and refrain from deeming as established the factual matters raised by plaintiff.

II. Discussion.

The record adduced in this case demonstrates that defendant has violated this Court's June 12, 1987 Order. Although that Order remanded this case in order to provide Anthony "a prompt and complete administrative ruling" on all eighteen of the Stride positions, defendant has, to this date, done neither. The Proposed Disposition released by NIH on November 17, 1988, was certainly not issued in a timely fashion. The decision was rendered 17 months after this matter was remanded to the agency in June 1987, and more than 20 months after the Court of Appeals' decision in March

1987.[3] It followed only after Anthony brought the instant motion for contempt and for sanctions. And it was issued only after defendant had moved for and obtained an extension of time to file its opposition to the instant motion.[4] In view of the fact that EEOC regulations require that investigations be concluded within 180 days of the date on which they are filed, see 29 C.F.R., section 1613.220(a), and because defendant offers

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[3] In addition, after the case was remanded on June 12, 1987, Anthony's Complaint was not even accepted by the agency until November 3, 1987 -- almost five months later.

[4] The grounds stated in defendant's motion were (1) that counsel had been sick and unable to give the agency notice of the motion until November 7, 1988 and (2) that agency counsel was new to the case and needed time to "research the voluminous files and assist in responding to the asserted facts in the motion."

no plausible explanation for the delay,[5] the Court must conclude that its actions in response to the Order of June 12, 1987 were simply not "prompt."[6]

Nor has defendant provided Anthony with a "complete administrative ruling" on his claims. The Proposed Disposition of November 17, 1988, makes clear that NIH as still not conducted any investigation into the fourteen Stride slots for which plaintiff was not highly qualified. Rather, in explaining its

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5/ Defendant rather obliquely observes that, when the second investigative report was completed in September 1985, plaintiff's counsel was provided an opportunity to submit comments but never did so. Opposition at 2. That argument is simply irrelevant, for it fails to offer any reason why the third investigation and Proposed Disposition ordered in June 1987 were delayed for so long.

6/ Defendant does not claim nor could he that the delay was justified by the need to become familiar with a new set of facts or circumstances, because the agency has been aware of Anthony's claims since May 1979.

decision, the Proposed Disposition states that

> On November 15, 1988, the Department, i.e., the Assistant Director for Investigations, OHR, notified NIH that in its view, the two investigations which had already been conducted into the Complainant's allegations had developed sufficient information to permit NIH to issue a proposed disposition with respect to the allegations concerning the remaining 14 positions.

See Exhibit 1 to Defendant's Opposition at 4-5. Defendant's decision not to conduct an investigation of the remaining fourteen Stride positions is remarkable. It ignores the clear commands of the Court of Appeals (which stated that the agency's investigation "should have extended to all eighteen Stride positions," Memorandum Opinion at 4) and of this Court (which remanded with respect to "the eighteen opportunity

discrimination claims" that Anthony presented to it, June 12, 1987 Order) (emphasis added in both). It also defies common sense for, if the agency possessed adequate information to rule on all eighteen Stride positions at the end of its second investigation (which concluded on March 5, 1985), it could have presented that information either to this Court -- which did not render its decision on the merits until April 25, 1986 -- or to the Court of Appeals which issued its Memorandum Opinion on March 5, 1987. Finally, defendent's position fails to take into account the history of this litigation, in which plaintiff sued to compel NIH to "investigate the facts relevant to plaintiff's nonselection for each of the eighteen Stride Program positions for which plaintiff made application," Complaint at 5; this Court

ruled that defendant need only investigate four of those positions; and the Court of Appeals then held that this Court erred in upholding defendant's attempt to limit its investigation. In short, having been ordered to conduct an investigation, defendant has done nothing at all.[7/]

Having said that much, this Court will refrain from holding defendant in contempt at this time. The Supreme Court has stressed that "[t]he judicial contempt power is a potent weapon." International Longshoreman's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1969). Our own Court of Appeals has made clear that, "[i]n light of the

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7/ Defendant's argument that Anthony's motion is moot because it has provided him with a ruling on the eighteen Stride positions is therefore irrelevant, for no investigation -- let alone a prompt one -- has ever been conducted into all eighteen positions.

remedy's extraordinary nature, courts rightly impose it with caution." Joshi v. Professional Health Services, Inc., 817 F.2d 877, 879 n.2 (D.C. Cir. 1987) (per curiam), and it has noted that, "[w]hile 'courts have inherent power to enforce compliance with their lawful orders through civil contempt,' courts need not impose the contempt sanction for every violation." Marshall v. Local Union No. 639, 593 F.2d 127, 1303 (D.C. Cir. 1979) (quoting Shillitani v. United States, 384 U.S. 364, 370 (1965) (footnotes omitted). In light of these admonitions, and given the unique circumstances of this case, the Court will not adjudge defendant in contempt at

this moment.[8/]

On the other hand, defendant has not thus far complied with this Court's

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8/ Defendant attempts to justify its actions by arguing that the Orders of this Court of Appeals have been complied with because they only required prompt and complete "rulings," but not "investigations." Supplemental Memorandum at 3 n.2. It is clear from the entire history of this litigation, however, that Anthony sought a proper investigation of his claims from the agency. This Court recognized that fact when ruling on the attorney's fees issue. See Opinion and Order of July 29, 1987 at 2 ("Upon remand this Court dismissed this case with an order directing defendant to broaden the investigation to include the additional charges of discrimination plaintiff seeks to raise"). The Court of Appeals also recognized that fact in its opinion dealing with attorney's fees. See 848 F.2d at 1280 (this Court's "decision that the agency need not investigate his non-placement in the remaining STRIDE positions was reversed . . ."); id, n.2 ("There is no indication in the record as to the current status of the agency's investigation into Anthony's claims"). And, most importantly, the administrative law judge recognized that fact when remanding Anthony's complaint for a third investigation in September 1987. See Exhibit B to Reply Brief ("The U.S. Court of Appeals has ordered the investigation of fourteen STRIDE positions . . .").

remand Order of June 12, 1987. Accordingly, this case will be reopened and remanded once again in order that defendant conduct an investigation of the fourteen Stride positions for which Anthony was not highly qualified. As the EEOC's regulations require, the investigation shall be completed, and a Proposed Disposition issued, within 180 days of this date.[9/] If defendant fails to meet this schedule, the Court will then proceed to consider plaintiff's motion for contempt and for sanctions and will not hesitate to hold defendant in contempt of this Opinion and Order, as well as its Order of June 12, 1987. If appropriate, the Court will impose

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9/ As also required by the regulations, Anthony shall cooperate with defendant to assure that its investigation proceeds without delay. Defendant shall file with the Court a copy of its Proposed Disposition after it has been issued.

sanctions at that time.[10]

III. Conclusion

For these reasons, it is

ORDERED that plaintiff's motion to reopen be and it hereby is granted and this action is remanded to defendant for proceedings consistent with this Opinion and Order; and it is

FURTHER ORDERED that plaintiff's motion to hold defendant in contempt and for sanctions be and they hereby are held in abeyance for a period of 180 days.

December 27, 1988

/S/
JOYCE HENS GREEN
United States District Judge

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[10] The Court therefore does not, and need not, address the parties' dispute over the remedy suggested by Anthony in the instant motion.